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ABOUT THIS NEWSLETTER

***TMT Bulletin** is a newsletter on technology, media, telecommunications and internet. Our Technology, Media and Communications Practice Group gathers knowledge from different areas to provide a holistic approach to the most complex legal issues brought by our clients. From telecommunications and audiovisual regulatory matters to tax, labor and intellectual property, Brazil is not a country of simple answers; an approach taken by a global company in another jurisdiction may need to be considered from surprising new angles.*

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New rules for taxation of games in São Paulo

Historically, transactions with electronic games are taxed differently by the ICMS in the State of São Paulo from transactions involving software in general. As of 2007 the state government had stipulated a specific tax basis, of twice the value of the physical support, for ICMS levy on software transactions. However, that very rule excepted transactions with electronic games, which led to the understanding that these were taxable by the ICMS on the transaction value (rather than on the physical support).

At the end of last year the rule on software transactions in the State of São Paulo was revoked, indicating the possibility of (i) the creation of a new tax basis for software transactions; and (ii) inaugurating the collection of ICMS on digital transactions.

On December 29, 2015, the State Councils ("CONFAZ") published Convention No. 181 which authorized States to charge a reduced ICMS of 5% (rather than the regular charge of 18%) on the transaction value for software and electronic games, available by any means, including electronic data transfers.

With the intention of regulating such Convention, the State of São Paulo published January 1, 2016, Decree No. 61,791, whereby it (i) confirmed the charge of the ICMS of 5% of the transaction value for physical software, but not physical electronic games (which continue to be subject to the 18% ICMS on the transaction value), and (ii) acknowledged and explained that downloading and streaming transactions would not be taxable by the ICMS until the place of the taxable event is regulated. Therefore, digital

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transactions, involving games or software are still not taxed by the ICMS in the State of São Paulo.

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New statute for the person with disability affects activities of internet service providers

Federal Law No. 13,146/2015 came into force on January 3, 2016, instituting the Statute for the Person with Disability and establishing obligations that directly affect the activities of internet service providers. According to such Law, accessibility to websites maintained by companies with headquarters or commercial representation in Brazil is mandatory for persons with disabilities, ensuring them access to available information (content), in keeping with the best accessibility practices and guidelines internationally adopted. The Law also establishes that virtual sales channels and advertising ads must provide, at the expense of their respective advertisers, accessibility by means of the following resources, according to the compatibility of the media: (i) closed caption; (ii) window with the Brazilian sign language (LIBRAS) interpreter; and (iii) audio description. The Law changed the Consumer Protection Code, establishing that information kept in records, forms, reports, personal and consumption data filed by providers of products or services about the consumer must be made available in formats accessible to persons with disabilities (for example, formats that can be recognized by screen readers), upon their request.

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Right of reply: recent law does not apply to comments made by internet users

Federal Law No.13,188/2015, in effect since November 12, 2015, regulates the exercise of the right of reply or correction by the person injured in any article disclosed, published or transmitted by social media vehicles, providing for the conditions and specific procedures for this purpose. Because the definition of article in the law expressly excludes “*comments made by internet users on the web pages of media vehicles*”, such content is not subject to the rules of said Law. As to the content generated by internet service providers themselves, if it consists of news reports, note or news, and offends, even due to incorrect information, the honor, intimacy, reputation, name, trademark or image of an individual or legal entity identified or identifiable, the exercise of the right of reply will be subject to the provisions of the Law in question, and must comply with the specific procedures established there. Among these procedures, the Law states that (i) the injured person shall request the reply or correction within 60 days from initial posting of the offensive article, by means of a letter, return receipt requested, sent directly to the media vehicle; (ii) the reply or correction shall be published free of charge and proportionally to the injury, and shall be given the same visibility, publicity, periodicity and dimension as the article that gave rise to it, under penalty of being deemed inexistent; and (iii) if the media vehicle does not publish the reply or correction within seven (7) days from receipt of the respective request, the injured person’s legal interest in filing a lawsuit requesting the reply or correction shall be characterized.

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Telcos challenge payment of CONDECINE in court

On January 29, 2016, the Federal Courts of the Federal District approved an injunction in a writ of mandamus filed by SindiTelebrasil, the national syndicate that represents the main telecommunications service

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providers, discharging them from the obligation to pay the Contribution for the Development of National Film Industry - CONDECINE. The decision was justified by Federal Judge Itagiba Catta Preta Neto by the lack of referability principle in the creation of the tax, which is essential for establishment of a contribution of intervention in the public domain such as CONDECINE, and which requires that the tax be collected only by entities that are part of business segment to which the contribution is directed. This is an important precedent for the sector. The final decision will be taken by the Federal Supreme Court as it involves a strictly constitutional matter.

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*Regulation of the
Internet Legal
Framework: Ministry of
Justice releases a draft
Decree for public
consultation*

On February 2016, the Ministry of Justice carried out a public consultation on the draft Decree that will regulate the Brazilian Internet Legal Framework (*Marco Civil da Internet*). The draft Decree was the second phase of a public online debate initiated on January 28, 2015, and was drawn based on comments received on the first phase from several individuals and industry players, concerning four major topics: data record, net neutrality, privacy and others. All these topics are broadly addressed in the Internet Legal Framework, but are subject to more detailed regulation.

Net Neutrality

Under the Brazilian Internet Legal Framework, net neutrality (prohibition of discrimination or degradation of data packets in the internet environment) is the rule and only two exceptions are permitted: (i) technical requirements necessary for the adequate provision of internet connection services; and (ii) prioritization of emergency services. The draft Decree provides, on its chapter II, a list of events that will be considered within these two exceptions.

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With regards to the first exception, the events listed in the draft Decree are: (a) handling of net security issues such as restriction on the delivery of spam and control of Distributed Denial of Services (DDoS) attacks, (b) handling of net traffic such as redirection of data packets, alternative routes and management of emergency situations, (c) handling of net quality issues to ensure minimum requirements set by the National Telecommunications Agency (ANATEL), and (d) handling of issues that are essential for the adequate use of the internet applications, aiming at ensuring the quality of the user's experience. In all cases, the traffic management measures adopted by the carriers must be disclosed to the users in the services agreements and in the carriers' websites, and as to events described in (c) and (d) above, the carrier may treat distinctly applications of different types, provided that all applications of the same type are treated equally. Although the draft Decree brings an exhaustive list of events permitted within the first exception to net neutrality, the wording used to describe these events is generic and leaves space for further discussions on what specific situations should be embraced therein.

In respect to the second net neutrality exception, the draft Decree sets out what will be considered emergency services: communication with providers of emergency services foreseen in ANATEL's regulation, and communications necessary to inform the population about situations with a risk of disaster, emergency or public calamity. ANATEL released last year a public consultation on what service providers should be considered providers of emergency services for the purposes of regulating this net neutrality exception.

Despite the intense debate during the first phase of the public consultation on whether zero rating plans should be considered a violation of net neutrality or not, the draft Decree did not settle this controversy. The Decree

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emphasizes principles such as the preservation of an unique, open, plural and diverse internet and the prohibition of discriminatory and anti-competitive practices but when it mentions agreements between ISPs and internet application providers, the Decree only prohibits the discriminatory prioritization of data packets (and not specifically the discrimination of packets prices), giving grounds for those who argue that zero rating consists just on a business model and not on data packet discrimination. The Decree also establishes that these agreements are subject to review by ANATEL. The Internet Steering Committee (GCI) released last year its opinion on the net neutrality regulation and made it clear that it believes business models are not within the scope of net neutrality discussions.

Protection to logs, personal data and private communications.

The draft Decree establishes that administrative authorities with legal competence to access, regardless of court order and in the cases prescribed by law, register data on parents' names, address and personal details of internet users (name, forename, marital status and occupation), whenever making such a request to an internet service provider, shall state the legal basis for their competence and the reasons for the request. Federal public bodies shall publish annually statistical reports on requests for record data made by administrative authorities, including number of requests submitted, list of the internet service providers from which data were requested, and number of requests granted and denied by them.

The draft Decree lists the guidelines on security standards to be observed by the internet service providers in retention, storage and handling of users data, which include the strict control over data access, authentication mechanisms for access to the logs, creation of a detailed inventory of access to the

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connection logs and application access logs, use of log management solutions through encryption technologies or equivalent protective measures to ensure data integrity, and logical separation of other data handling systems for business purposes.

The draft Decree provides for a very broad definition of “personal data”, as being “any data relating to an identified or identifiable natural person, including by reference to identification numbers, location data or electronic identifiers, also comprising connection logs and application access logs, and content of private communications”

Supervision and Transparency

Under the draft Decree, three governmental bodies will supervise, investigate and penalize violations in the internet environment: ANATEL, the National Consumer Office at the Ministry of Justice (SENACON) and the Administrative Council for Economic Defense (CADE). ANATEL will be responsible for supervising, investigating and penalizing violations to net neutrality rules, to the rules concerning the relation between ISPs and internet application providers and to the rules concerning connection logs registries protections. SENACON is responsible for supervising, investigating and penalizing violations to Consumer Protection laws and CADE is responsible for violations to the economic order. In all cases, GCI should be consulted, whenever necessary.

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